IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 380

B. A. KAUSAL,

Petitioner,

vs.

79TH AND ESCANABA CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN A. BUSSIAN,
Chicago, Illinois,
Counsel for Respondent.

EDWARD I. DEBOLT,
Chicago, Illinois,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX

Table of Cases.

Text Books and Statutes.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 380

B. A. KAUSAL,

Petitioner,

vs.

79TH AND ESCANABA CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

I.

Opinions of Courts Below.

The petitioner is in error when he states that no opinion was rendered by the District Court, except as set out in the record on pages 59 and 60. The record referred to by the petitioner is the order of the District Court. At the time this order was entered the Judge of the District Court read his opinion and it was incorporated in the transcript of evidence, and at the time the order was entered the Judge of the District Court made written findings of fact and conclusions of law, which are a part of the record in the District Court. Neither the transcript of the evidence nor the District Court's findings of fact

and conclusions of law, were brought up to the Circuit Court of Appeals, although the designation of record prepared by the petitioner, for the purpose of bringing the record in the District Court to the Circuit Court of Appeals, specified at the time it was served upon the attorney for the respondent that such record would include the transcript of the evidence, but thereafter, the petitioner's attorneys instructed the Clerk of the District Court, to exclude the transcript of evidence from the record on appeal, without notifying the attorney for the respondent. However, under the view taken of this matter by the respondent, the opinion of the District Court is not now material on the petition for writ of certiorari.

II.

Jurisdiction.

The petitioner apparently realizes that the only possible grounds upon which he could sustain his petition for a writ of certiorari, is upon the theory that the Supreme Court of the United States will review a decision of the Circuit Court of Appeals in the event the Circuit Court of Appeals renders a decision in conflict with a decision of another Circuit Court of Appeals on the same subject. The principle is set out in the rules of Court and in the cases of *Magnum* v. *Coty*, 262 U. S. 159, and *Forsyth* v. *Hammond*, 166 U. S. 506, cited by the petitioner, but in the first mentioned of these cases at page 163 the Court says:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases for certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of

importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the circuit court of appeals, a heavy burden rests on the applicant."

And in the other case, the court said in effect, that while the court does not doubt its power it has been chary of actions in respect to certiorari, and the power will be sparingly exercised, and only exercised when it is satisfied of necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and Courts of the State, or when there is some matter affecting the interest of the nation.

III.

Comments on Petitioner's Statement of the Case.

The petitioner incorporates in his statement of the case pages 2 to 4 of his petition. In these pages of his petition the petitioner admits that he sent out a communication to the shareholders of the debtor successor without first submitting such communications to the court, as required by rule of court. He then sets out a portion of the order of June 11, 1940, restraining such communications. He did not, however, set out that part of the order of June 11, 1940, which shows that at the time the order of June 11, 1940 was entered, the cause came on to be heard for rule upon the petitioner to show cause why he should not

be held in contempt of court for violating a previous order of the court, entered on December 3, 1937; nor does the petitioner show that part of the order setting out that all parties of record, including the petitioner then on trial, consented to the entry of the order of June 11, 1940 (Tr. 37, 28).

The petitioner emphasizes that a decree, confirming the plan of reorganization, was entered on January 23, 1939 and that the debtor's property was conveyed on June 1, 1939 to its successor as provided in the Plan of Reorganization and the restraining order in question was entered thereafter on June 11, 1940. The petitioner wholly fails to state the fact that the matter was, for good cause, yet pending before the District Court and the final decree had not been entered and was not entered until the 28th day of April, 1941 (Tr. 45), and the final decree specifically reserved in the court the jurisdiction for the purpose of taking any action, steps or proceeding, which the court may from time to time deem necessarily advisable or proper against any person, for a violation of the order of June 11, 1940, based upon any acts or things done prior to the entry of the final decree and, particularly, the pending contempt proceedings against petitioner, Benedict A. Kausal for violation of the injunction order entered on June 11, 1940.

The petitioner, without reason, confuses the effect of a decree of confirmation with the final decree, and does not take into consideration those provisions of the statute then in force, known as Section 77B of the Bankruptcy Act, as amended, especially the part thereof, outlining the jurisdiction and duties of the District Court, to proceed after the decree confirming the plan, to complete the reorganization and make the plan effective, as set out in 77B (h) U. S. C. A. Title 11, page 1067, Sec. 207, and 77B (c) (10) U. S. C. A. Title 11, page 1063, Sec. 207.

Apparently the petitioner is laboring under the misapprehension that he was being punished for interfering with assets of the debtor corporation, after these assets had been conveyed in keeping with the plan of reorganization, whereas, as a matter of fact and law, the petitioner was sentenced to punishment for interfering with the orderly procedure of the court. That the court has power to protect itself and prevent disturbance of its procedure, is so elementary, as to need no comment.

Reasons Relied Upon for the Denial of the Writ.

The petitioner contends that the decision of the Circuit Court of Appeals is in conflict with the decisions in other jurisdictions, as to the effect of an order confirming a plan of reorganization; and in support of this contention, he cites a District Court case. Apparently, the petitioner has overlooked the provisions of Rule 38 (5) (b) of this Court and the two decisions of this Court referred to above under the title "Jurisdiction," from which it clearly appears that that conflict of decisions with which the United States Supreme Court may concern itself, is not a conflict between decisions of the District Courts of the United States, but a conflict between decisions of the Circuit Court of Appeals in the various Circuits and the petitioner had not referred to any Circuit Court of Appeal, decisions contrary to the opinions of the Circuit Court of Appeals in this case.

The petitioner states that the effect of a decree of confirmation in a corporate reorganization proceeding, needs clarification. However, under those sections of 77B of the Bankruptcy Act, hereinbefore referred to, it is quite apparent that the decree confirming the plan of reorganization is not a final decree as it does not complete the court's work, nor its duties. The court is under a duty and has the jurisdiction to take a number of steps after the entry

of the decree confirming a plan, before it loses jurisdiction and before its work is done, and it is elementary that as long as a matter is lawfully in court, or as long as a court has any function to perform, the court may protect itself by an injunction order from interference with its procedure and the orderly conduct of the case. This continuing jurisdiction has been recognized in numerous cases.

At this point the petitioner refers to two decisions of the Circuit Court of Appeals of the Second Circuit, which he says are in conflict with a decision of the Circuit Court of Appeals in this matter. The one case *In re Prudence-Bonds Corporation,* 77 Fed. (2d) 328. In this case the order appealed from, restrained the appellants from foreclosing, selling or encumbering, the mortgages made by the debtor and pledged with the appellants, or from distributing the cash on hand to bondholders or to the trustees, or to their agents, except upon application to the District Court. The court referred to Section 77B of the Bankruptcy law, providing that the court shall, during the pendency of the proceedings under that section, have exclusive jurisdiction of the debtor and its property, wherever located, and the court said that the court had jurisdiction of the debtor's property through all the intermediate steps of reorganization; and to permit the untrammeled right of the appellants to foreclose underlying mortgages, may well destroy the equities in the pledged property and embarrass the reorganization of the collateral thus held. It might destroy all chances of reorganization, and therefore the order appealed from was confirmed.

In re Adolph Goebel, Inc., 80 Fed. (2d) 849, the other case cited by the petitioner in this connection, an order was entered restraining an action against an Iowa corporation, the common stock of which was subsequently owned by the debtor in reorganization. The court held in substance

that the law did not authorize enjoining a creditor of a solvent and wholly independent subsidiary from prosecuting an action at law, in a state court, merely because its common stock is held by the debtor in reorganization. Neither of these cases are upon the same subject as the decision of the Circuit Court of Appeals in this matter. The *Prudence-Bonds Corporation* case, however, clearly supports the court's jurisdiction in this case.

The petitioner contends that the restraining order violates the provisions of the Federal and Illinois State Constitutions, guaranteeing to every citizen the right of free speech and writing and cites 16 Corpus Juris Secundum 628, which does not support the petitioner's contention; that authority making it clear that the right to freedom of speech and writing is not an absolute license to speak or publish anything that one pleases free of all legal liability therefor. This subject, as well as all the other contentions of the petitioner, is set forth and answered in the opinion of the Circuit Court of Appeals found in the transcript of the record herein (Tr. 72 to 76).

IV.

Argument.

Having followed the petitioner's statement of the case, including his petition, which is incorporated by reference in the statement of the case, it appears that this statement itself, and the authorities cited therein, by the petitioner, defeats each and every contention of the petitioner set out in his argument.

Furthermore, the opinion of the Circuit Court of Appeals so ably and completely answers and disposes of every contention of the petitioner that it hardly behooves

us to attempt to improve upon that opinion, and it is quite sufficient at this point, to respectfully refer this court to the opinion of the Circuit Court of Appeals in this matter.

If further argument is necessary, we would say that the petitioner's statement under Point A of his argument, that in a corporate reorganization proceeding a decree of confirmation terminates the court's jurisdiction to consider any matters *de hors* the plan of reorganization, is a fallacy apparent upon the statement itself.

The case of *Consolidated Gas, Elec. L. & P. Co.* v. *United Railways & Elec. Co.*, 85 Fed. (2d) 799 cited by the petitioner holds in substance that the allowance of a claim after the confirmation of a plan of reorganization, may amount to altering the plan and that the court therefore could not allow the claim in question. In other words, the law contrary to the petitioner's statement, is that the court may not, except in certain cases, consider matters within the plan after the confirmation of the plan; but there are many matters outside of the plan which the court may and must consider after the order of confirmation is entered, in order to complete the reorganization of the corporation, and make the plan effective, as provided in Section 77B of the Bankruptcy Act, paragraphs (h) and 77B (c) (10) above referred to.

In a similar manner the statement of Point B of the petitioner, namely, that a court of bankruptcy had no jurisdiction to enter a restraining order after the debtor's property had been conveyed to a new corporation so that it is no longer in *custodia legis*, defeats itself, is contrary to sections of 77B (h) and 77B (c) (10) referred to above. As pointed out above, the case *In re Goebels, Inc.*, 80 Fed. (2d) 849, has no bearing upon the point, and likewise the case *In re Lake's Laundry, Inc.*, 79 Fed. (2d) 326, simply determines the right of a seller under a con-

ditional sales contract entered into with the debtor, prior to the reorganization, under paragraphs 77B of the Bankruptcy Act, holding that such rights are not impaired by the reorganization proceedings, this having nothing to do with the matter in question.

It would indeed, be an anomaly of the law, if, pursuant to the plan of reorganization, the court, as it did here, sanctioned the conveyance of the debtor's property as a step in carrying out the plan, it should be held that the court thereby lost jurisdiction of the proceeding, and was unable to complete the reorganization, and enter the final decree as required by Section 77B under which it was proceeding. It would also be an anomaly of the law if it should be held that a court having a duty to perform in a matter could not restrain one from interfering with the court's orderly performance of that duty; and such is the contention of the petitioner.

Under the final point of the petitioner's argument, he contends that the restraining order was a nullity in that it restrained the freedom of speech and writing. The principle that one is not obliged to obey an order of court that is an absolute nullity, is recognized; but an order of the court is never a nullity, when issued by a court of competent jurisdiction, and even though such order may be in error, it must be obeyed. The proper remedy of one wronged by such erroneous orders is not by disobedience but by appeal.

In Re 4145 Broadway Hotel Co. (7th Cir.), 100 Fed. (2d) 7, 8.

Pacific Ry. v. *Ketchum*, 101 U. S. 289; 25 L. Ed. 932.

Swift & Co. v. *U. S.*, 276 U. S. 311; 72 L. Ed 587.

Brougham v. *Oceanic Steam Navigation Co.*, 205 Fed. 857, 860.
Tornanses v. *Melsing*, 106 Fed. 775, 788.
Blake v. *Nesbet*, 144 Fed. 279, 284.
Smith v. *Kimball*, 128 Ill. 583, 594.
4 C. J. 716, Para. 2631, also 717, Para. 2635.
Brown v. *U. S.*, 196 Fed. 351.

The restraining order did not unlawfully restrain the rights of freedom of speech and writing and this principle is clearly shown by the opinion of the Circuit Court of Appeals published in the transcript of record herein (Tr. 72 at page 75), and the authorities therein cited.

Therefore, it is respectfully submitted that as a matter of law this court should deny the petition for the writ of certiorari.

Respectfully submitted,

JOHN A. BUSSIAN,
Counsel for Respondent.

EDWARD I. DEBOLT,
Of Counsel.